No. 90-762

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

THOMAS and SHARON FREYTAG, *et al.*,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITIONERS' REPLY BRIEF

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INTRODUCTION

The government concedes that the language of the Tax Court's rules implementing its statutory authority in cases under 26 U.S.C. § 7443A(b)(4) is "not ideal" (Government's Brief "GB" 19), and that the Tax Court's supposed fit within the Executive Branch is "not . . . perfect." (GB 41). But the problem here is far graver than inadequate phrasing or imperfect fit. When, as in this case, a special trial judge effectively decides a (b)(4) case, he acts with neither congressional nor constitutional mandate.

To avoid the force of petitioners' statutory argument, the government asks this Court to hypothesize a secret and unrecorded Tax Court procedure, inaccessible to the parties, that is unmentioned in the record below or in any Tax Court Rule or decision. Active and searching oversight of special trial judges in (b)(4) cases is in fact precluded by the Tax Court's own rules: parties

have no opportunity to see or file exceptions to a special trial judge's report, and once that report is filed with the Tax Court, Rule 183(c) provides that its factual findings "shall be presumed to be correct." Congress did not and cannot have intended to establish such a regime.

To avoid the force of petitioners' constitutional argument, the government invokes a parade of horribles not remotely presented by this case—the supposed disruption of appointments in the "50 free-standing agencies of the Executive Branch." (GB 46). But Article I courts are the sole entities whose appointment power is at issue here, and these wholly adjudicatory entities are uniquely lacking in the attribute the Framers deemed essential to exercise of the appointment power: protection from Congress, either through the political muscle of the President or the independence of the Article III judiciary. In order to rule that the Article I Tax Court is not an "Executive Department," and hence may not be vested with the power to appoint inferior officers, this Court need not issue any advisory opinions about the possible existence and constitutional status of a headless "Fourth Branch" of government.

I. THE STATUTORY VIOLATION

1. The linchpin of the government's interpretation of 26 U.S.C. § 7443A(b)(4) is that this category of special trial judge jurisdiction is readily distinguishable from subsections (b)(1) to (3) because Congress denied special trial judges the authority to make the judgment of the Tax Court in (b)(4) cases. Yet the government defends the judgment below in the face of a record demonstrating the passive adoption of the special trial judge's report by the regular Tax Court judge, who entered the report as his own opinion with the sole addition of his signature. Such rubber-stamping is not authorized by the statute and cannot have been Congress' intent.[1]

[1] The government asserts that whether Congress authorized the Tax Court to allow special trial judges to "'effectively resolve'"

2. The government agrees that, "[b]y statute, a special trial judge has no authority to decide a case assigned under [(b)(4)]." (GB 17). The difference between us is that petitioners believe that "making the decision" requires the Tax Court to scrutinize the special trial judge's report, review the record, apply law to fact, and make appropriate modifications, whereas for the government, "making the decision" is satisfied so long as the opinion is formally "issued by the Tax Court in the name of" a regular Tax Court judge." (A7) (GB 18 n.9). In stark contrast to the pre-1984 practice that the government claims Congress meant to codify in subsection (b)(4),[2] the Tax Court opinion here contains no

(b)(4) cases was not presented in the Petition for Certiorari. (GB 17). This is absurd: the first Question Presented raises the issue of "effective resolution" *in haec verba*.

[2] The government's own authorities (GB 14 n.8) conclusively establish that Tax Court review of cases assigned under the pre-1984 practice that Congress supposedly codified was the *opposite* of the rubber-stamping that is now conducted under § 7443A(b)(4). *All* of those cases were decided under a now-superseded rule that provided that any report by a special trial judge was to be served on the parties who could then file briefs and objections with the regular Tax Court judge, who had to take them into account in scrutinizing the record and adapting the special trial judge's report before he made his decision. *See* former Tax Court Rule 182(b) & (c) (1979). *See Estate of Wheeler v. Comm'r*, 37 T.C.M. (CCH) 51 (1978) (special trial judge merely presided over trial; findings of fact and opinion were written by *a regular Tax Court judge*); *Estate of Thurner v. Comm'r*, 37 T.C.M. (CCH) 981, 981 (1978) (report modified "after considering the entire record herein, the briefs of the parties, petitioners' exception to the special trial judge's report, and respondent's reply thereto."); *Perrett v. Comm'r*, 74 T.C. 111, 135-36 (1980) (report modified after taxpayers' objections were specifically addressed and given "careful consideration").

But old Rule 182 was amended, effective 1984 (the year § 7443A(b)(4) was enacted), to delete this procedure. *See* 81 T.C. 1045, 1069. The present practice under Rule 183(c) does not ensure that a regular Tax Court judge in fact critically reviews the report of a special trial judge before adopting it. This supervisory

hint of review of the transcripts or exhibits, no discussion of the parties' arguments, no suggestion of any critique or modification of the special trial judge's report—just the single sentence "The Court agrees with and adopts the opinion of the special trial judge that is set forth below," followed by a copy of that report. (A14).

Although this procedure is not consistent with either the statutory design or congressional intent, it is perfectly consistent with Tax Court Rule 183(c), which mandates that the special trial judge's findings "shall be presumed to be correct." (A92). The government admits that "the phrasing of this sentence is not ideal" (GB 19), but nevertheless insists that this language somehow includes a duty of *de novo* review by the Tax Court. Actually, the language of Rule 183(c) is clear enough: it precludes the possibility of the *de novo* review that the government would have this Court believe actually takes place in the Tax Court. *Stone v. Commissioner*, 865 F.2d 342, 344-47 (D.C. Cir. 1989). (*See* Petitioners' Brief "PB" 21 & n.32). The decision below was "made" by the special trial judge; *all* that was before the Fifth Circuit on appeal from the Tax Court was the special trial judge's findings of fact and conclusions of law.

3. The government asks this Court to presume administrative regularity in this case. (GB 18 n.9). But if we presume that the Tax Court operated in accord with its own published rules and that the record in this case accurately reflects the procedures followed, then the government's statutory argument is doomed. For that would mean (1) that, in accord with Rule 183(c), the special trial judge's report was in fact "presumed correct" rather than reviewed *de novo*; (2) that we must take at face value the Tax Court's statement here that *all* it did was "agree with and adopt the opinion of the special trial judge" (A14); (3) that we must accept what the Fifth Circuit's decision (A8) and the Tax Court docket entries confirm—that the special trial judge's report was adopted verbatim the moment it was filed with the Tax Court. (PB 8-9, 23-24). If this is in fact what took place, the government agrees that § 7443A was violated. (GB 17).

regime contrasts sharply with that governing the work of federal magistrates, whose findings of fact and conclusions of law—and even their rulings on pretrial motions—are all subject to *de novo* review if any party files objections. (*See* PB 28).

Instead of evidence to support any other version of the events below, the government offers only speculation about a supposed vague procedure, unmentioned in the statute, Tax Court rules, or any Tax Court decision, and unreflected anywhere in the record below. As the government would have it, the Chief Judge obtained the report, the 9,000 page transcript, the 3,000 exhibits and the 200 hours of videotaped testimony from the special trial judge, gave them careful study, and modified the report as necessary before that report was even filed with the Tax Court. (GB 18 n.9). The government thus asks this Court to presume *administrative regularity* in these proceedings, *id.*, while suggesting that Tax Court review of the report took place in an unrecorded and *administratively irregular* manner—indeed, in a manner that appears to violate the procedural sequence spelled out in Tax Court Rule 183(b) & (c). No such inference is remotely plausible.[3]

[3] Not only is there no trace of this hypothetical preview procedure in the record of this case or in any Tax Court rule, it is equally absent from the cases cited by government. (GB 18 n.9) It appears from the Tax Court's opinion in each of those cases, as it does here, that the special trial judge's report was adopted without discussion or modification. And the docket entries that the government cites, like those in this case, confirm that the special trial judge's report was filed with the Tax Court and adopted the very same day.

II. THE APPOINTMENTS CLAUSE VIOLATION

A. Special Trial Judges Are Not Ministerial Employees.

1. Every court to address the issue has held that special trial judges are inferior officers. *See* A79-80 (Tax Court); *Samuels, Kramer & Co. v. Comm'r*, Nos. 90-4060/4064 (2d Cir. April 2, 1991) (Reprinted as an appendix to the Government's Supplemental Brief ("GSB App.") at 21a). Indeed, even the government seems to agree that special trial judges are inferior officers, for it argues only that "a special trial judge assigned under 26 U.S.C. § 7443A(b)(4) performs duties that *may* be performed by an employee not subject to the Appointments Clause." (GB 28) (emphasis added). Since Congress supposedly *could have* provided that petitioners' cases be assigned to a mere employee, we are told that petitioners may not complain that they were *in fact* assigned to an improperly appointed inferior officer. That is like saying that, if petitioners had gone to an Article III district court to litigate the disputed tax, the fact that the district judge had been appointed without the advice and consent of the Senate would raise no Appointments Clause issue because Congress could have left the resolution of such tax disputes entirely to executive officers anyway. (*Cf.* GB 35). This theory will not do—regardless of what Congress *might* have done, it made special trial judges inferior officers without providing for constitutional appointment.

2. The government next reasons that special trial judges may be deemed mere employees in (b)(4) cases such as this one because they lack formal authority to enter a final decision. (GB 28-31). But, as the Second Circuit has just held in the related case of *Samuels, Kramer & Co. v. Comm'r*, "special trial judges are more than mere aids . . . They take testimony, conduct trials, rule on the admissibility of evidence, and have the power to enforce compliance with discovery orders. . . . They exercise a great dealt of discretion and perform important functions, characteristics that we find inconsistent with the classifications 'lesser functionary' or mere employee." (GSB App. 21a). Under the government's reasoning, federal magistrates would be mere employees doing insignificant tasks when they conduct felony jury voir dire, conduct suppression hearings, or decide pretrial and discovery motions, since those acts do not involve a final decision.[4]

B. The Tax Court is Not a "Court of Law."

There is one issue on which petitioners are in complete agreement with the government: the Article I Tax Court cannot be deemed a "Court of Law" within the meaning of the Appointments Clause, for in that clause the Framers used "Courts of Law" to denote those courts constituted in accord with Article III. (GB 35-38). Indeed, even the *amicus* affirmatively endorses the proposition that when the "Founding Fathers intended to limit" a clause of the Constitution "to Article III courts, they . . . used the word 'Courts,' as used in Article III, rather than the broader word 'Tribunals.'" Brief of *Amicus Curiae* ("Am.B") at 3 n.2. The entire argument of the *amicus* proceeds from the misapprehension that petitioners and the government somehow challenge the

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[4] The government also ignores the fact that the "distinction between officer and employee in this connection does not rest upon . . . the character of the service to be performed. [It] . . . is determined by the manner in which Congress has specifically provided for the creation of the several positions, their duties and appointment thereto." *Burnap v. United States*, 252 U.S. 512, 516 (1920). The office of special trial judge is "established by Law," Art. II, § 2, cl.2, and the duties, salary and means of appointment for that office are specified by statute. (PB 27-28). This distinguishes special trial judges from special masters hired by the Article III courts on a temporary, episodic, *ad hoc* basis, whose positions are not established by law, and whose duties and functions are not spelled out by Congress in a statute. *See Burnap*, 252 U.S. at 516-17; *United States v. Germaine*, 99 U.S. (9 Otto) 508, 511-512 (1879); *United States v. Maurice*, 26 Fed.Cas. 1211, 1214 (No. 15,747) (1823) (Marshall, C.J.).

legitimacy of Article I tribunals. (Am.B 18). But all that is at issue is the status of Article I tribunals under the Appointments Clause, and as to *that* issue the *amicus* (Am.B 24), like the government (GB 46-47), offers what is in essence an extra-constitutional appeal to governmental convenience—an appeal this Court has never hesitated to reject when the Constitution's textual commands are at stake. *See, e.g., INS v. Chadha*, 462 U.S. 919, 963 (1983).

C. The Tax Court Is Not An Executive "Department."

1. The government's ultimate rationale for deeming the Tax Court an Executive "Department" is the fear that any other holding might threaten whatever appointment power may be vested in independent commissions like the FTC and in other "free-standing" executive agencies not affiliated with a Cabinet Department. (GB 46-47). Aside from the fact that solicitude for government convenience is never sufficient to override the Constitution's textual commands, this particular scare tactic is a red herring. Only the *Tax Court's* appointment power is at issue here. Significantly, the government does not quarrel with the fact that the elimination of the Chief Judge's power to appoint special trial judges, or its transfer to the President, would not impair the operations of the Tax Court. (PB 37-38 & nn. 34, 35). Instead, the government proceeds as if the decision in this case necessarily would govern independent commissions and other "free-standing agencies of the Executive Branch." (GB 46).[5]

[5] The government does not even suggest that any significant disruption of other Article I tribunals would ensue from denying Congress the freedom to vest them with appointment power. Only Claims Court vaccine masters would be threatened, and the President has already asserted that their appointment violates the Constitution. (PB 40-41; GB 29-30 n.24). Currently, "appointments" by other Article I courts are limited to employees. *See, e.g.*, 38 U.S.C. § 4081 (Court of Veterans Appeals may name its own court clerk,

The government is coy about the nature and extent of this "threat," declining to inform this Court as to (1) which, if any, of these agencies harbor "offices established by Law" to which inferior officers must be appointed, and what those offices might be,[6] (2) which, if any, of the heads or chiefs of those agencies are empowered by Congress to appoint inferior officers, and (3) precisely how the elimination of such appointment power, or a transition to appointments by the President himself, would adversely affect federal operations.[7] In any event, the

law clerks, and secretaries). None of these positions is further defined by law and the holders thereof must be considered employees rather than "officers of the United States." The government also seems to agree that the territorial courts are not subject to the separation of powers principle embodied in the Appointments Clause. (GB 36 n.28; PB 35-36 n.33).

[6] Joseph Story's statement that inferior officers outnumbered principal officers among the "lucrative offices" of the federal government in 1833 (GB 47) does not speak to the relevant issue. As this Court noted as early as 1879, a person "may be an agent or employee working for the government and paid by it, as nine-tenths of the persons rendering service to the government undoubtedly are, without thereby becoming its officers." *Germaine*, 99 U.S. at 509.

[7] The incremental burden on the President of naming 14 special trial judges would scarcely be noticed. According to the Office of Presidential Personnel, Executive Office of the President (May, 1989), Congress already requires that more than 2,000 inferior officers in the lower echelons of the Executive Departments, regulatory commissions and independent agencies be appointed by the President alone or with the advice and consent of the Senate. In actual practice, even when formal appointment power is lodged in the President or a Department Head, lower agency and Department officials routinely select their own subordinates, whose appointments are forwarded to the Office of Presidential Personnel for review and approval.

This practice accords with the Framers' intent. When James Madison objected that the proposed Appointments Clause was too cumbersome, and that "Superior Officers" other than "Heads of Departments ought in some cases to have the appointment of the lesser offices," Gouverneur Morris replied, "There is no necessity. Blank commissions can be sent." 2 M. Farrand, *The Records of the*

issue of the independent agencies' appointment power *vel non* can be left to law review commentators for now, because it is not presented in this case. This Court need not decide whether the chairman of the FCC can wield appointment power in order to decide whether the Tax Court is an Executive "Department."

2. The Government assumes that every federal entity in Washington, D.C. must fit within one of three pigeonholes. Such attempts to squeeze a government entity into one "branch" or another are no more edifying or helpful to constitutional analysis than trying to define "rigid categories" of "executive" or "quasi-legislative" officials. *Morrison v. Olson*, 487 U.S. 664, 689 & n.28 (1988). The Framers "rejected the notion that the three Branches must be entirely separate and distinct," *Mistretta v. United States*, 109 S.Ct. 647, 659 (1989), and this Court has "recognized the constitutionality of a 'twilight area' in which the activities of the separate Branches merge." *Id.* at 662. In any event, the questions of the existence and constitutionality of a headless "fourth branch" of government are not before the Court today, and no majority of this Court has ever endorsed the government's procrustean approach to the separation of powers, much less applied that approach in resolving a challenge under the Appointments Clause.

3. There are powerful reasons to doubt that the Tax Court is in the Executive Branch. The Government admits that the Tax Court's fit within the Executive Branch is not "perfect." (GB 41). That is a marvel of understatement, given the Government's own concession that, in 1969, Congress expressly repealed "the language explic-

Federal Convention of 1787 627 (1966). (A94). Statutes providing for appointments by officials other than "Heads of Departments" or the President alone, subject to review and approval by the President or a Department Head, have long been enacted by Congress and sustained as constitutional. *See, e.g., Germaine*, 99 U.S. at 54; *United States v. Mouat*, 124 U.S. 303, 307-08 (1888).

itly stating that the Tax Court was an agency in the Executive Branch" (GB 39), precisely because it wished "to distance the Tax Court from the Executive Branch." (GB 41 n.33). Under the public rights doctrine, perhaps Congress could have put the resolution of tax disputes entirely in the hands of executive officials in the Internal Revenue Service, along with their other duties; but it is undeniable that in 1969 Congress chose not to do so.[8]

The Article I Tax Court functions in its entirety in a purely judicial capacity. In contrast, for example, to the Cabinet Departments and the independent regulatory commissions, the Tax Court formulates no regulatory policy, promulgates no substantive rules of conduct, brings no lawsuits or enforcement actions, prepares no position papers, gives no policy advice, investigates no problems

[8] The government relies upon the 1969 Act's statement that the new Article I Tax Court is " 'a continuation of the Tax Court of the United States as it existed prior to the date of enactment of this Act' " (GB 40), to establish that Congress "implicitly intended no substantive change in the Tax Court." (GB 40). As both the context of that provision and the legislative history make plain, however, this statement meant only that "the bill is to have no effect upon existing litigation, jurisdiction, etc.," so that all would know that Tax Court operations and pending cases had not been interrupted. S.Rep. No. 552, 91st Cong., 1st Sess. 305 (1969). The Report makes plain that Congress stripped the Tax Court of its "constitutional status as an executive agency, no matter how independent." *Id.* at 302.

The government also argues that the sitting Tax Court judges could not be continued in office without re-appointment by the President and Senate if Congress had in fact "reconstituted the Court outside the Executive Branch" (GB 40), relying on *Olympic Fed. Sav. & Loan Ass'n v. Director*, 732 F.Supp. 1183 (D.D.C. 1990). But *Olympic* in fact held that Congress *is free to* "chang[e] the duties" of or transform an "office" without Appointments Clause constraint so long as it leaves in place *all* the incumbent officers and does not pick and choose among them. *Id.* at 1193. *See Shoemaker v. United States*, 147 U.S. 282, 301 (1893). Congress did just that when it moved the Court of Claims out of the Article III Judiciary and reconstituted it as an Article I court in 1982. (PB 38 & n.35).

and administers no programs. All it does is adjudicate tax disputes and perform the usual ancillary tasks, like issuing its own procedural rules.

Since it has no part whatsoever in executing the law, it is unsurprising that the Tax Court is in no way under the control or supervision of the Executive Branch. Although the President appoints Tax Court judges, he may remove them only for cause, *see* 26 U.S.C. § 7443(f), which effectively precludes "coercive influence." *Mistretta*, 109 S.Ct. at 675. In contrast to Departments and agencies, the Tax Court is not subject to the Executive Branch administrative apparatus orchestrated by the Office of Management and Budget, nor is it subject to Executive Orders, inquiries, or supervision. *See* H. DuBroff, *The United States Tax Court: An Historical Analysis* 190 & n.177, 215 n.351 (1979). The President cannot oversee the Tax Court's operations because its budget, unlike those of Executive Departments, agencies and regulatory commissions, goes directly to Congress rather than to OMB. *Id.* at 215. For all intents and purposes, the Tax Court is " 'an instrumentality of the United States Government independent of the executive departments.' " *Bowsher v. Synar*, 478 U.S. 714, 730 (1986).

4. The flipside of this lack of supervision by the President (which the government does not and cannot contest) is lack of protection by the President. Without the lifeline to the White House enjoyed by Departments, agencies and commissions, the Tax Court is vulnerable to congressional influence. Its budget goes before Congress without the President or any other Executive Officer as its champion and intermediary. Tax Court judges' salaries can be reduced. Although it might be possible to argue that "Departments" encompasses more than those entities subject to a significant degree of presidential control, the government admits that, under the Appointments Clause, the term " 'Departments' is limited to Executive Branch Departments *protected* from [congressional] encroachment by the various constitutional powers of the Chief

Executive." (GB 9) (emphasis added). The government further admits that, "[w]ere the Tax Court . . . outside the scope of those protections, it would be subject to precisely the sort of congressional interference in the appointments process that the Appointments Clause was designed to forestall." (GB 9-10). (*See also* GB 37-38). Yet once one examines the actual relationship of the Tax Court to the rest of the federal government, it becomes clear that the Tax Court enjoys no real presidential protection beyond the empty label "Department" that the government would bestow.

5. If the Tax Court were an Executive "Department," incongruous results would be inescapable; indeed, the government has not disputed them. First, the Tax Court would be subject to a host of statutes governing executive administration—the Administrative Procedure Act, the Freedom of Information Act, the Ethics in Government Act—even though Congress reconstituted the Tax Court in 1969 as an Article I court precisely to avoid such anomalies. (PB 29-30). Second, the Chief Judge of the Tax Court, as the principal officer of an Executive Department, would be required by Art. II, § 2, cl.1 to provide the President with his opinion in writing on any subject within his office, which consists entirely of pending tax cases, in defiance of both congressional intent and the ban on Tax Court advisory opinions. *See Roderick v. Comm'r*, 57 T.C. 108, 112-13 (1971); (PB 30 n.27).[9]

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[9] This Court held long ago in *Germaine* that "[t]he word 'department,' in both these instances [the Appointments and Opinion Clauses of Art. II], clearly means the same thing, and the principal officer in the one case is the equivalent of the head of department in the other." 99 U.S. at 511. The Framers in fact used the phrases so interchangeably that when the Opinion Clause was recorded as proposed in the words "principal officer in each of the Executive Departments," and then voted on and adopted (without record of any intervening amendment) in the words "Heads of Departments," no one noticed or remarked on the difference. *See* 2 M. Farrand, *supra*, at 541-43.

6. Even if the Tax Court were somehow shoe-horned into the Executive Branch, that would not render it a full-fledged Executive "Department." Surely more than one type of entity—possessing more than one defined set of duties and powers—is possible within the Executive Branch, just as there are different types of organizational entities within the Legislative (the two Houses of Congress, the Government Accounting Office, the Library of Congress) and Judicial Branches (the Judiciary, the United States Sentencing Commission, *see Mistretta*, 109 S.Ct. at 663).

As demonstrated above, the Tax Court's relationship with the President and the Executive Branch lacks any of the indicia of an Executive "Department." Nowhere in the corpus of federal laws and regulations is the Tax Court referred to as a "Department." Congress, which certainly knows how to "creat[e] these subdivisions of the executive branch by giving to each of them the name of a department," *Germaine*, 99 U.S. at 510-11, did not do so with respect to the Tax Court. Indeed, the government's own reference for what it calls the "free-standing agencies of the Executive Branch" *omits* the Tax Court. *See* 55 Fed.Reg. 44,196 (1990). Instead, the Office of the Federal Register describes the Tax Court as "an independent judicial body in the legislative branch." Office of the Federal Register, Nat'l Archives and Records Admin., *The United States Government Manual* 76 (1989/1990).

This Court has never defined "Department" for Appointments Clause purposes to include Article I tribunals such as the Tax Court. *See Germaine*, 99 U.S. at 511; *Burnap*, 252 U.S. at 515. The government dismisses these decisions, contending that this Court's characterizations of the Executive Branch Departments "were simply descriptive of the composition of the Executive Branch of government at the time." (GB 44). The government is quite mistaken, for the establishment of Article I courts predates both of those decisions by several decades. The

government would have us believe that, when Justice Brandeis defined "Department" for a unanimous Court in *Burnap* in 1920 in a way that excluded Article I courts, he was simply ignorant of the fact that such tribunals had existed for nearly a century.[10]

The most natural reading of the term, as well as the one supported by the history of each provision, is that "Department" means the same thing each time it is used in describing the Executive power under Article II—in the Appointments Clause, the Opinion Clause, and the 25th Amendment (which amends Art. II). The government embraces this canon of construction when it suits its purposes. Thus the government agrees with petitioners that the term "Courts of Law" in the Appointments Clause denotes the same "Courts" referred to in Article III. (GB 36). Yet the government argues that the phrase "Heads of Departments" in the Appointments Clause is broader than the phrase "principal Officers of the executive Departments" used in the Opinion Clause and the 25th Amendment, and suggests that the former phrase must therefore be deemed to include Article I tribunals. (GB 45-46). But it has long been held that the two phrases mean exactly the same thing. *See supra* n.9.[11]

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[10] Article I courts date to at least as early as Chief Justice Marshall's decision sustaining their constitutionality in *American Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511 (1828). The Court of Claims was established in 1855. *See Williams v. United States*, 289 U.S. 553, 562 (1933). The Court of Private Land Claims was established in 1891. *See United States v. Coe*, 155 U.S. 76, 84 (1894). The Choctaw and Chickasaw Citizenship Court was established in 1902. *See Wallace v. Adams*, 204 U.S. 415, 417 (1907).

[11] In any event, what is at issue is the meaning of the term *"Department,"* and even if one assumes that the Chief Judge of the Tax Court is the "Head" of that tribunal in some sense, that does not make the Tax Court an "Executive Department" as the government claims. Even if the chairmen of the independent regulatory commissions (such as the SEC, FTC) could be deemed "Heads of Departments" because they are the President's chosen lieutenants,

7. The government does not dispute the proposition that the Framers feared the appointment power and were anxious to limit its dispersion to officers protected by checks and balances from congressional encroachment, either by Article III tenure (the Courts of Law) or by the mantle of the President (the Heads of Departments). (PB 24-26). Yet the government's theory that every "free-standing" agency it deems to be within the Executive Branch is a full-fledged "Department" would confer the power to appoint inferior officers on the Article I courts, which are beyond the President's supervision and protection, and perhaps on other entities as well. The government would thus reverse the decision of the Constitutional Convention to limit diffusion of appointment power because the government, like the Convention's dissenting voice, James Madison, believes that the Appointments Clause "does not go far enough." 2 M. Farrand, *The Records of the Federal Convention of 1787* 627 (1966). But the Framers have *already* expressly taken the practical needs of government into account, *see id.*, and weighed them against the need to control the diffusion of appointment power and to provide an effective separation of powers. It is not up to the Court or Congress to restrike that balance.[12]

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see D. Welborn, *Governance of Federal Regulatory Agencies* 6-7, 37, 141 (1977) (although commissioners are appointed to fixed terms, the chairman generally holds that special post at the President's pleasure), and because their agencies are part of the executive apparatus for enforcing and administering the laws and programs enacted by Congress, the Chief Judge of the purely adjudicatory Tax Court (who is chosen by his fellow judges, 26 U.S.C. § 7444(b)) cannot be put in the same category.

[12] The government's reliance on the statement of Rufus King (GB 47-48) is inapposite. The government's ellipses conceal the fact that King was speaking of the impracticality of appointment of "minute officers"—he seems to have been referring not to inferior officers but to ministerial employees—by the Senate or an Excutive Council, rather than by the President himself. 2 M. Farrand, *supra*, at 539. King's remarks were made on September 7, 1787, a full week before the provision of the Appointments Clause at issue in this case was even proposed. *See id.* at 627.

III. THERE WAS NO AND CAN BE NO WAIVER IN THIS CASE

1. The government fails in its attempt to depict this Court as concerned only about the prerogatives of the Article III courts, and as generally unconcerned about maintaining the integrity of the Constitution's other structural elements. Neither *CFTC v. Schor*, 478 U.S. 833 (1986), nor *Pacemaker Diagnostic Clinic v. Instromedix*, 725 F.2d 537 (9th Cir.) (*en banc*), *cert. denied*, 469 U.S. 824 (1984), purported to distinguish among structural principles and to require attention to some while relegating others to the vagaries of waiver rules and litigation strategies.[13] Indeed, the government is unable to identify even a single case in which any court has endorsed its proposed distinction between the structural principles of Article III and all others. Most recently, the Second Circuit squarely rejected the government's analysis in the related *Samuels, Kramer* case:

> Structural protections such as those embodied in the Appointments Clause stand on a different footing from personal constitutional rights. As the Supreme Court has stated, "[t]o the extent that [a] structural principle is implicated in a given case, the parties cannot by consent cure the constitutional difficulty." *Schor*, 478 U.S. at 850-51. . . . Were such institutional interests—as distinguished from personal constitutional rights—so easily waived, the affirmative requirements imposed by the Appointments Clause would effectively be rendered null and void.

(GSB App. 17a-18a). It was therefore appropriate for this Court to reach and decide the Appointments Clause

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[13] Both *Schor* and *Pacemaker* did, however, distinguish between the personal rights element of a constitutional provision, which may be waived, and the structural element, which cannot. The government does not contest that the Appointments Clause has no personal rights element but only structural implications. (PB 45).

issues supposedly waived by the parties in *Glidden v. Zdanok*, 370 U.S. 530 (1962), and *Lamar v. United States*, 241 U.S. 103 (1916). (PB 42-43). Those were not, unlike *Schor*, cases of alleged encroachment on the Article III Judiciary, but rather Appointments Clause cases that happened to involve the appointment of judicial officers, and they are fully applicable here.

2. The government's plea that this Court defer to the Executive's assessment of Appointments Clause challenges and rely upon the President to pursue all such issues should also be rejected. (GB 23-24). The fact that the Solicitor General was a party in both *Glidden* and *Lamar* did not move this Court to enforce the private party's waiver of his Appointments Clause claim, and for good reason. The President may have his own competing reasons for signing a law that he deems unconstitutional, and the Executive, like any other party to litigation, may act for short-term advantage to preserve a given judgment or to serve some competing end that, for the moment, it values more highly than the Appointments Clause. For example, in the instant case it is unsurprising that the government prefers to overlook a serious Appointments Clause question, since consideration of that question may threaten a special trial judge's resolution of test cases that, if sustained, may garner the Treasury more than $1.5 billion in tax revenue. (PB 1).[14]

[14] The government attempts to color the Court's attitude by focusing on facts supposedly showing petitioners' transactions to be "shams." (GB 2-6). But if either the Tax Court or the Fifth Circuit had ever actually examined the record, rather than just the special trial judge's report, they would have found much evidence that there was economic substance to petitioners' trades—including the taxes petitioners paid on their trading profits. The special trial judge simply disregarded weeks of testimony by petitioners' three experts, who closely examined petitioners' *actual* transactions, in favor of the testimony of the government's one witness, who never looked at the actual transactions but instead analyzed hypothetical transactions loosely based on the investment company's trading program.

But what is best for the Executive Branch, either in a particular case or in the long run, is not necessarily what is best for the Republic. The structural principles embodied in the Appointments Clause do not, simply because they are located in Article II, speak only or even primarily to Executive prerogatives. Power to appoint inferior officers does not belong to *any* branch or official until Congress creates an office and assigns the appointing power. The government is therefore grossly mistaken in assuming that all that is at stake here is its own appointment "perks." The structural interests protected by the Appointments Clause are not those of any one branch, but of "We the People."

3. Even if such a structural challenge could be waived, petitioners' mid-trial "consent" to the assignment of this case to a special trial judge was involuntary. For all of its comments about insincerity and "crocodile tears" (GB 22), the government does not dispute the coercive burden imposed on petitioners when they were offered the "choice" between abandoning 19 months of trial and consenting to having a special trial judge conclude the case. (PB 49-50). When the alternative involves such "measurable hardships," *Pacemaker*, 725 F.2d at 543, "consent" to finishing the trial before a constitutionally suspect presiding officer cannot deprive a party of the right to challenge that officer's appointment and to seek retrial before a properly constituted tribunal. *Id.*

4. Finally, judicial economy would be served by resolving this important Appointments Clause issue here and now. The identical issue is presented in the related *Samuels, Kramer* case just decided in the Second Circuit and, as the government notes (GSB 2), there is no waiver or consent issue there. The petitioners in *Samuels, Kramer*, who are represented by the same counsel as petitioners here, will soon file a Petition for Writ of Certiorari in that case. Since this issue has been fully ventilated in these proceedings, no purpose would be served by

failing to reach and decide it now rather than in the coming Term.

CONCLUSION

For these reasons, the judgment below should be reversed and this case remanded for a new trial.

Respectfully submitted,

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